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Supreme Court, U.S.
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No. 95-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT DUSHAW,

Petitioner,

v.

ROADWAY EXPRESS, INC. AND TRUCK DRIVERS LOCAL UNION NO. 407,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 66 F.3d 129 (6th Cir. 1995); the opinion of the district court (Pet. App. 17) is unreported in F. Supp.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. The petition for rehearing en banc was denied on December 1, 1995. Pet. App. 14. The September 27, 1995 opinion was revised on that day. Pet. App. 15. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This "hybrid § 301" action was filed by petitioner, Robert Dushaw, under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, against respondents, Roadway Express, Inc. and Truck Drivers Union Local 407. The suit follows petitioner's unsuccessful attempts to overturn Roadway's decision to terminate his employment through the grievance machinery provided under the applicable collective bargaining agreement.

On April 21, 1987, as a result of numerous disciplinary infractions and work rule violations, Roadway discharged petitioner from his position as a truck driver. Pet. App. 6. At the time of his discharge plaintiff was a member of the International Brotherhood of Teamsters Chauffeurs, Warehousemen, and Helpers of America, Local 407 and was employed under the terms of the applicable collective bargaining agreements, which are known as the National Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement. Pet. App. 19-20.

Before his discharge, petitioner sought and obtained, on April 21, 1987, an informal company level hearing concerning his discipline. Pet. App. 4-5. Petitioner was represented at this hearing and throughout the grievance proceedings by Richard

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[1] The opinion appears at 122 L.C. (CCH) ¶ 10,246 (N.D. Ohio 1992) and 140 L.R.R.M. (BNA) 2461 (N.D. Ohio 1992).

Sanzo, Local 407 Business Agent. Pet. App. 5. Also present at the company level hearing was Ken Scullion, a union steward. At the company level hearing, Roadway asked Scullion some impromptu questions regarding his dock activities in connection with the loading of petitioner's truck. Scullion responded to these questions. Scullion did not attend any later hearings. Pet. App. 6-7.

After Roadway discharged Petitioner, the Union filed a grievance with the Cleveland Joint Committee, an arbitration panel composed of neutral industry and union members. Pet. App. 6-7. A hearing was held at which petitioner was represented by Sanzo. Pet App. 7. The Union then pursued the grievance to the arbitration panel of the State Joint Committee. The numerous issues considered at both the Cleveland and State hearings essentially were the same. At the hearings, petitioner testified that he was satisfied with Sanzo's representation and had an adequate opportunity to present all of his arguments to the Committee. The State Committee upheld the discharge. Pet. App. 8.

The union then sought a new grievance hearing to reopen the case, claiming that Dushaw had new evidence to present. After reviewing the alleged "new evidence", the State Committee again upheld the discharge. Pet. App. 62.

Petitioner brought this § 301 action against the Union and Roadway in the Northern District of Ohio. Almost two years after the conclusion of a bench trial, and without the aid of a trial transcript, the district court found for petitioner. The district court determined that Roadway had targeted petitioner for termination and had wrongfully discharged him. Pet. App. 8. The court also concluded that the Union had breached its duty of fair representation during the course of the grievance proceedings. The court stated that Sanzo had not vigorously defended petitioner and failed to adequately investigate the incidents leading to the discipline. The court found that Scullion had made false statements regarding petitioner's conduct and that both Sanzo and

Scullion generally bore animosity toward the petitioner based on their previous history. Pet. App. 82-3.

In its conclusions of law, the court found that the Union had failed: "to treat [petitioner] 'without hostility or discrimination;'" "to assert [petitioner's] rights 'in complete good faith and honesty;'" and "to 'avoid arbitrary conduct.'" Pet. App. 84 (quoting *Ruzicka v. General Motors*, 523 F.2d 306, 309-10 (6th Cir. 1975)). The court also concluded that the Union's conduct "significantly tainted the grievance proceedings to the extent that but for such conduct, it is more likely than not that a different result would have ensued." Pet. App. 85. The court awarded damages and attorneys' fees and assessed punitive damages against Roadway. Pet. App. 9.

The Sixth Circuit reversed. The court noted that to recover from either Roadway or the Union in a § 301 action, petitioner had to prove a breach of the collective bargaining agreement by Roadway, a breach of the duty of fair representation by the Union, and taint from the Union's breach such that the outcome of the proceeding was more than likely affected. Pet. App. 9-10. The court determined that petitioner had failed to prove the latter. Pet. App. 11. The court, assuming *arguendo* that the Union had acted in an arbitrary, discriminatory or bad faith manner, held that petitioner had failed to prove that the Union's alleged breach had tainted the grievance proceedings and that petitioner had failed to show that, but for the breach, the outcome of the proceedings would likely have been different. Pet. App. 11-12.

The court concluded that petitioner had an adequate opportunity to present all of the issues that he wished to present, based upon the records of the hearings and petitioner's own statements to that effect. Moreover, petitioner failed to point to any evidence that was missing from the grievance proceedings and which, if presented, would probably have brought about a different decision. Pet. App. 12.

ARGUMENT

This is an employee discharge matter, which turns on the individual facts of this case. While petitioner purports to raise legal issues, the law applied by the court of appeals is well-settled. There is no confusion or conflict in the courts of appeals, nor does the court of appeals decision contravene any decision of this Court. The decision below does not merit further review by this Court.

1. Petitioner argues that the court of appeals erroneously interpreted § 301 of the National Labor Relations Act, 29 U.S.C. § 185, to require, as part of his claim that the union breached its duty of fair representation, proof that the grievance proceeding was tainted by the union's breach and that such taint more than likely affected the outcome of the proceeding. *See* Pet. App. 10.

a. Petitioner did not raise this argument in his brief to the court of appeals. Petitioner, instead, argued that the district court had correctly found taint in its proceeding. As a result, the court of appeals did not have an opportunity to directly address the issue of whether taint is required in these cases. Issues raised for the first time in a petition for certiorari are not properly before this Court. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

b. In any event, the court of appeals's interpretation of § 301 comports with this Court's own interpretation in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Generally, where grievance machinery is set up by contract to settle disputes between labor and management, courts will defer to the decisions of the arbitrators. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Nevertheless, the *Hines* Court determined that a union's breach of its duty of fair representation during grievance proceedings could relieve an employee of the requirement that he settle dispute through the contractual procedures. The "bar of the finality provisions of the contract" will not, however, be lifted

unless the union's breach "seriously undermines the integrity of the arbitral process." *Hines*, 424 U.S. at 567.

In order to prove a breach of the duty of fair representation, an employee must show that the union's action was either "arbitrary, discriminatory or in bad faith." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (internal quotations omitted). Moreover, as the court of appeals correctly noted in this case, an employee must show that "the Union's actions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach." Pet. App. 10. This requirement plainly follows from this Court's decision in *Hines*.

In addition to indicating that the union's breach must "seriously undermine[ ] the integrity of the arbitral process," the *Hines* Court found that where an employee has utilized the contractual grievance and arbitration proceedings, as in this case, the focus is on "whether there is substantial reason to believe that a union breach of duty contributed to the *erroneous outcome* of the contractual proceedings." *Id.* at 568 (emphasis added). In a summary at the conclusion of its opinion, the *Hines* Court concluded that employees are entitled to relief "if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee." *Id.* at 572. There is no question that the court of appeals was correct in requiring that the petitioner show that the union's breach of duty tainted the proceeding and resulted in an erroneous discharge.

Petitioner concedes that "most of the courts of appeals" and "most, if not all" of the courts of appeals that have considered this issue have agreed with the Sixth Circuit. *See* Pet. 17-18. Petitioner cites cases from the Eighth, Fourth, Fifth, and Seventh Circuits, which have agreed with the Sixth Circuit. Pet. 17-18. Petitioner fails to cite any court of appeals decision to the contrary.

2. Petitioner claims that there is confusion in the law regarding the evidence necessary to prove the requisite "taint." Petitioner asserts that the court of appeals decision in this case requires, in effect, that an employee produce the testimony of the panel

members who decided the case at issue in order to show that the outcome was affected by the union's breach of duty. Petitioner argues that no one can meet such a requirement because of the doctrine of judicial immunity. Pet. 19-20.

a. Petitioner's claim is a mischaracterization of the court of appeals decision in this case. Petitioner simply failed to present any evidence that the decision was tainted. For example, petitioner failed to pinpoint any "missing evidence" that "would have caused the employer to reconsider a decision to discharge the employee." Pet. App. 12. The court was further persuaded by the fact that petitioner "admitted at the state level hearing that he had had an opportunity to present all issues he wished to present." *Id.*

Petitioner's failing in this regard is highlighted by cases in which the taint requirement has been satisfied. In *Hines* itself, for example, the petitioners were able to point to specific evidence not introduced by the Union, casting doubt on the employer's charges, that the union would have found had it performed an adequate investigation. 424 U.S. at 558. In *Black v. Ryder/ P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994) the Sixth Circuit upheld a jury's determination that a union breached its duty where the plaintiff specifically showed the union's lack of an adequate investigation. The court stated that the failure to present favorable evidence can constitute a breach "if that evidence probably would have brought about a different decision." *Id.* at 585. There is absolutely no suggestion here or by the *Black* court that a plaintiff must produce the testimony of the administrative decision-makers to satisfy the standard.

b. Petitioner claims that there is a conflict between the court of appeals's decision and the Eighth Circuit's decision in *Thomas v. Bakery, Confectionary & Tobacco Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied sub nom. Metz Baking Co. v. Thomas*, 484 U.S. 1062 (1988). According to petitioner, the *Thomas* court determined that "taint" existed despite the fact that the arbitrator had had all of the essential facts before him. Petitioner attempts to contrast the court of appeals's

statement that the joint committee had heard "both sides of the story and had seen the manifest and records" in this case. Pet. App. 12.

Petitioner makes two critical mistakes. First, in this case, the main reasons supporting the conclusion that the proceeding had not been tainted were petitioner's own admission that he had presented all of the evidence that he wished to present at the hearing and petitioner's failure to point to any "missing evidence" that would have led to a different outcome. Pet. App. 12. Thus, not only did the joint committee hear "both sides of the story," but they heard the complete story. *Id.*

Second, petitioner misconstrues *Thomas*. The district court, in setting aside the jury's verdict, ruled that the arbitrator had all of the essential facts before him. The *Thomas* court, however, rejected this conclusion. The court determined that the arbitrator had one person's version of a document essential to the case rather than the actual document. *Id.* at 763. The court found that, under the facts of that particular case, had the union adequately represented the employee, it would have produced a copy of the contract for the arbitrator. *Id.* Thus, the *Thomas* court, contrary to petitioner's characterization, concluded that there was taint precisely because the arbitrator did not have all of the essential facts in front of him.[2] There is no conflict between this case and *Thomas*.

3. Petitioner argues that the court of appeals failed to apply correctly this Court's decision in *Anderson v. City of Bessemer City*, which delineated the proper application of the clearly erroneous standard of review. 470 U.S. 564, 573-6 (1985).

This issue does not warrant review by this Court. Petitioner does not allege uncertainty in the lower courts with regard to the application of *Anderson*, nor does he suggest that the Sixth Circuit's approach conflicts with any other appellate courts.

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[2] The *Thomas* decision is another example of a petitioner who proved taint apparently without the testimony of the arbitrator.

Furthermore, petitioner's claim of error in this case is incorrect. The court of appeals was well aware of *Anderson* and acted within its confines. Pet. App. 11 (quoting *Anderson*, 470 U.S. at 573). The court of appeals did not make independent credibility determinations nor did it reweigh the evidence. The court of appeals simply concluded that there was no taint because there was "*no* evidence to support a finding that [union] actions tainted the grievance procedure." Pet. App. 11 (emphasis added).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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